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In the Supreme Court of the United States

OCTOBER TERM, 1971

MUNICIPAL LIGHT BOARDS OF READING AND WAKEFIELD, MASSACHUSETTS, PETITIONERS

v.

FEDERAL POWER COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1–23) is reported at 450 F. 2d 1341. The order of the Federal Power Commission (Pet. App. 26–39) is reported at 43 F.P.C. 626 and its order denying reconsideration (Pet. App. 40–42) is reported at 43 F.P.C. 950.

JURISDICTION

The judgment of the court of appeals (Pet. App. 24–25) was entered on October 14, 1971. The petition for a writ of certiorari was filed on January 12, 1972. The jurisdiction of this Court is invoked under 28

458-850—72

U.S.C. 1254(1) and Section 313(b) of the Federal Power Act, 16 U.S.C. 8251(b).

QUESTION PRESENTED

Whether an order of the Federal Power Commission pursuant to Section 205(e) of the Federal Power Act, 16 U.S.C. 824d(e), suspending the effectiveness of a rate increase filing by a public utility for one day pending a hearing and decision on the lawfulness of the filing is subject to judicial review on the ground that the Commission abused its discretion in not ordering suspension for a longer period.

STATUTE INVOLVED

Section 205(e) of the Federal Power Act, 16 U.S.C. 824d(e), is set forth at Pet. App. 43–44.

STATEMENT

In January 1970, the Boston Edison Company filed with the Federal Power Commission pursuant to Section 205 of the Federal Power Act, 16 U.S.C. 824d, a rate schedule to supersede an existing schedule, which contained certain changes in the terms of service and an increase in rates (Pet. App. 2, 27). Petitioners—two municipal electrical distribution systems—urged the Commission to reject Edison's rate filing, contending that the filing was deficient in several respects and that its service terms violated national antitrust policies. Alternatively, petitioners requested that the effectiveness of the rate filing be suspended for the maximum statutory period—five months—and that the filing be made the subject of an investigation and hearing (Pet. App. 2–3, 28).

In April 1970, the Commission issued an order (Pet. App. 26–37) denying petitioners' motion to reject the filing, suspending the effectiveness of Edison's proposed rate schedule for one day until May 1, 1970, at which time it became effective, and scheduling a hearing on the new rates. The order also required Edison to make refunds in the event any portion of the rate increase was subsequently found not to be justified (Pet. App. 28, 34–35). Commissioner Carver dissented on the sole ground that the filing should have been suspended for longer than one day (Pet. App. 3, 38–39). Petitioners' subsequent motion to have the effective date of the rate increase postponed to enable them to adjust their retail rates and pass on the increase to their customers was denied (Pet. App. 3). Petitioners then sought rehearing of the Commission's April order, which the Commission treated as a motion for reconsideration and denied (Pet. App. 40–41).

On appeal, the court of appeals unanimously affirmed (Pet. App. 1–23). Relying on this Court's decision in *Arrow Transportation Co.* v. *Southern Ry. Co.*, 372 U.S. 658, and other cases arising under statutory suspension provisions similar to Section 205 of the Federal Power Act, the court held that the one-day suspension order was not subject to judicial review with respect to either the granting of the one-day suspension or the denial of a five-month suspension. The court noted that petitioners had alleged only that the Commission had abused its discretion in refusing to grant a five-month suspension; accordingly, this was not a case where "the suspension action taken

or declined by the agency is plainly without any statutory authority or in defiance of a 'clear and mandatory' statutory command or reflects an error evident on the face of the papers * * *" (Pet. App. 17–18).

ARGUMENT

The decision below is correct. There is no conflict with decisions of this Court or other courts of appeals or any other reason for plenary review.

1. Petitioners argue that the Commission's decision to suspend Edison's proposed rate increase for only one day was an abuse of discretion and is subject to judicial review.[1] That such a decision is not subject to judicial review, however, is strongly suggested by this Court's decision in *Arrow Transportation Co.* v. *Southern Ry. Co., supra.*[2] In holding that the courts lacked the equitable power to extend the maximum suspension period authorized under Section 15(7) of

[1] Petitioners' contention (Pet. 12) that, save in exceptional cases, the Commission cannot suspend the effectiveness of a rate filing for less than five months is plainly without merit. Section 205(e) of the Federal Power Act provides that the Commission "may" suspend rate filings, "but not for a longer period than five months * * *." The very terms of the provision indicate that the Commission may in its discretion order a suspension for any period up to five months. In the past ten years, there have been thirteen electric rate increase proposals suspended by the Commission under Section 205(e), nine for five months and four for one day.

[2] As the court below noted (Pet. App. 16–17), there is substantial authority for the proposition that a decision by the Commission to accept a rate filing, in lieu of suspending it, would not be subject to judicial scrutiny. See, *e.g.*, *Luckenbach Steamship Co.* v. *United States*, 179 F. Supp. 605, 609–610 (D. Del.), vacated as moot, 364 U.S. 280; *National Industrial Traffic League* v. *United States*, 287 F. Supp. 129 (D.D.C.), affirmed *per curiam*, 393 U.S. 535.

the Interstate Commerce Act, 49 U.S.C. 15(7), and imposed by the Interstate Commerce Commission with respect to a new rate filing, the Court concluded that Congress intended to vest in the Interstate Commerce Commission the sole and exclusive power to suspend the effectiveness of proposed new rates and "to foreclose a judicial power to interfere with the *timing* of rate changes * * *" (emphasis in original). 372 U.S. at 668. Section 205(e) of the Federal Power Act is virtually identical to Section 15(7) of the Interstate Commerce Act and, while the Court in *Arrow Transportation* noted that its decision would not necessarily govern the construction of Section 205(e) (372 U.S. at 666, n. 13), petitioners have pointed to nothing suggesting that Congress intended to distinguish between the suspension authority granted to the two federal agencies under the two statutes.

Thus, judicial review of the Commission's suspension decision in the present case would constitute the very thing proscribed by *Arrow Transportation:* judicial interference with the *timing* of rate changes. Moreover, as the court below noted (Pet. App. 16–17), the one-day suspension benefits petitioners since, as a result of the suspension, Edison has the burden of proof to justify its rate increases before the Commission and must make refunds with interest of any portion of the increase later found to be unjustified.

The conclusion that suspension orders are not subject to judicial review is not undermined by this Court's decision in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, and its progeny. In that case, the Court held that "judicial review of a final agency action by

an aggrieved person will not be cut off unless there is a persuasive reason to believe that such was the purpose of Congress." 387 U.S. at 140; see also *Barlow* v. *Collins*, 397 U.S. 159, 174. Because suspension orders are procedural and not "final agency action," see, *e.g.*, *Humble Oil & Refining Co.* v. *Federal Power Commission*, 236 F. 2d 819 (C.A. 5), certiorari denied, 352 U.S. 967, *Hunt Oil Co.* v. *Federal Power Commission*, 236 F. 2d 828 (C.A. 5), certiorari denied, 352 U.S. 970,[3] and because Congress has entrusted the *timing* of rate increases to the Commission's discretion, the inference is compelling that such orders are not subject to judicial review.

2. Contrary to petitioners' claim (Pet. 7), there is no conflict between the decision of the court below and the holdings of the Tenth Circuit in *Phillips Petroleum Co.* v. *Federal Power Commission*, 227 F. 2d 470 (C.A. 10), certiorari denied *sub nom. Michigan Wisconsin Pipe Line Co.* v. *Phillips Petroleum Co.*, 350 U.S. 1005; and the Fifth Circuit in *Hunt Oil Co.* v. *Federal Power Commission*, 398 F. 2d 746 (C.A. 5). In *Phillips*, the court of appeals held that the Commission's order suspending a rate filing was reviewable because it presented a question of law involving construction of a contract. 227 F. 2d at 475–476.[4] In *Hunt*, the Fifth Circuit reviewed a suspension order of the Commission because of allegations that the

[3] These cases involved Section 4 of the Natural Gas Act, 15 U.S.C. 717c, which is virtually identical to Section 205 of the Federal Power Act.

[4] A similar question was presented in *Cities Service Gas Co.* v. *Federal Power Commission*, 255 F. 2d 860 (C.A. 10), cited by petitioners (Pet. 10).

Commission not only abused its discretion but also exceeded its statutory authority. 398 F. 2d at 748.[5] As the court below recognized (Pet. App. 18), limited judicial review in such instances may be proper.

3. Petitioners' reliance (Pet. 14–16) on the body of cases headed by *Amarillo-Borger Express, Inc.* v. *United States*, 138 F. Supp. 411 (D.C. N.D. Tex.), vacated as moot, 352 U.S. 1028, to support the reviewability of suspension orders overlooks the fact that at the time of its decision in *Arrow Transportation, supra*, this Court was aware of these cases as well as contrary holdings by lower courts. 372 U.S. at 667, n. 15, and 670, n. 21. Nevertheless, the Court concluded that Congress had foreclosed the judiciary from interfering with the timing of rate changes. 372 U.S. at 668. Indeed, only recently, another court of appeals has stated: "We believe that *Arrow* [*Transportation*] has resolved this conflict in favor of those courts holding no review." *The Port of New York Authority* v. *United States*, C.A. 2, No. 71–1769, *et al.*, decided November 9, 1971, slip op. pp. 453–454.

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[5] Petitioners' reliance (Pet. 12) on *Hope Natural Gas Co.* v. *Federal Power Commission*, 196 F. 2d 803 (C.A. 4), is also misplaced. The issue of suspension for less than five months was not before the court or the Commission.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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